



Coronavirus/COVID-19: - *General Considerations for Physical Therapy Private Practices*

Every day brings new concerns and challenges for physical therapy practices who prioritize the health and safety of their employees/communities but remain very mindful of the need to continue to meet their business goals and obligations and provide care to patients. Although it is impossible to discuss every situation that can arise, below is a discussion of some common scenarios that a practice may encounter:

What if...

An employee¹ ...

- Appears to be ill and/or unable to perform any of his/her work duties?

Practices have broad rights to make sure that those who report for work can perform their job duties in a way that is safe for themselves and others. So, if a practice has a reasonable basis to question an employee's ability to safely perform his/her job or be in the workplace, it generally may send the employee home pending further investigation of the circumstances. Such an investigation should focus on the employee's functional capabilities and ability to work in his/her workplace (not the specific medical nature of the employee's condition) and rely on the opinions of medical providers/professionals (not lay assumptions or generalizations).

- States that he/she is unable to work?

It is important to understand the basis of the employee's request.

- Is it due to the employee's own health condition?

If the employee is unable to work because he/she: (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (3) is experiencing symptoms of COVID-19 and is seeking a medical diagnosis, the employee may be entitled to paid leave under the Families First Coronavirus Response Act ("FFCRA") signed by President Trump on March 18,

¹ See also Coronavirus/COVID-19 Legal Update on Families First Coronavirus Response Act ("FFCRA") available at <https://ppsapta.org> [_____].

2020. ([See](#), Coronavirus/COVID-19 Legal Update on Families First Coronavirus Response Act (“FFCRA”).) IMPORTANT: emergency responders and health care workers may be excepted from the right to certain paid leaves under the FFCRA. A practice should seek legal guidance regarding this specific circumstances.

Employees who are unable to work due to a non-COVID-19-related condition should be treated in accordance with whatever plans or leave programs that the practice has established ([e.g.](#), FMLA, STD, LTD, sick days, PTO, etc.) should be administered in accordance with their terms and conditions.

The COVID-19-related health condition of someone else?

If the employee is unable to work because he/she is caring for someone who: (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; or (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, the employee may be entitled to paid leave under the Families First Coronavirus Response Act (“FFCRA”) signed by President Trump on March 18, 2020. ([See](#), Coronavirus/COVID-19 Legal Update on Families First Coronavirus Response Act (“FFCRA”).)

If an employee is unable to work because he/she is caring for someone affected by any non-COVID-19-related health condition, the practice should handle the situation in accordance with the plans or leave programs that the employer has established ([e.g.](#), FMLA, non-FMLA family leave, sick days, PTO, etc.) as administered in accordance with their terms and conditions.

- Something else ([e.g.](#), lack of childcare for a child whose school has closed, general anxiety)?

If the employee is unable to work because he/she is caring for a son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions, the employee may be entitled to paid leave under the Families First Coronavirus Response Act (“FFCRA”) signed by President Trump on March 18, 2020. ([See](#), Coronavirus/COVID-19 Legal Update on Families First Coronavirus Response Act (“FFCRA”).)

For all other “personal reasons” that do not fall in the above categories, whatever plans or leave programs that the practice has established to cover absences for personal non-health-condition-related reasons ([e.g.](#), personal days, PTO, etc.) should be administered in accordance

with their terms and conditions. If a practice wishes to expand its plans and programs given due to the current unprecedented circumstances, it should clearly communicate its plans to employees and seek legal advice if needed.

- Asks to work from home (or for some other accommodation)?

It is important to understand the basis of the employee's request.

- Is it due to the employee's own health condition?

Practices should apply their usual ADA-based analysis for interacting with, understanding and addressing employee's request for health-based requests for any change in their work duties or working conditions. Accordingly, practices should determine: (1) whether the request is due to a condition that meets the ADA's definition of a disability; (2) what duties/conditions the employee can/cannot perform/tolerate; (3) whether the duties that the employee cannot perform are "essential," as defined by the ADA; (4) what accommodations would allow the employee to perform his/her job; (5) whether those accommodations are reasonable, etc.

- Is it due to a reason unrelated to a health condition of the employee?

Generally, practices have no legal obligation to provide non-disability-related accommodation requests unless they have agreed to or said they would do so in employment contracts or policies. So, it is largely up to practices to decide whether they want to, in recognition of the extraordinary circumstances here, voluntarily do so. If so, see the below discussion regarding employees working remotely.

The practice...

- Decides to direct certain employees to work remotely?

Practices typically have broad rights to direct their workforce, including where employees perform their duties. That said, here are some key considerations:

- It is critical that employees are well aware of a practice's expectations of them while they are working remotely (e.g., work hours, duties, reporting structure, clocking in/out (especially for non-exempt employees), deliverables, accessibility, etc.). It is absolutely critical that a practice knows/controls at all times who is working and who isn't. (One illustration: generally, salary exempt employees must be paid their full salary for any week in which they perform any work, so a practice who doesn't intend to pay salaries to physical

therapists during a long shutdown must make sure that exempt employees perform no work during any week in which they are not paid.)

- If a particular employee's work calls on them to handle confidential or private information in a certain way (e.g., in compliance with HIPAA or other privacy laws), practices must ensure that there are policies and procedures in place to ensure compliance with all legal and contractual requirements.
- Intends to require or offer therapists the ability to see patients in the home?
 - The practice should take additional steps such as confirming that the practice and its employees have appropriate automobile and liability insurance, determining whether third party payors will reimburse for services provided in the home, and considering additional steps in the employment screening process such as confirmation of a valid driver's license.
- Needs to layoff certain employees (for example, those who cannot work remotely or whose jobs are affected by a reduction in demand or business)?
 - Practices usually have broad rights to layoff or terminate employees for whom it no longer has work, subject of course to any specific contractual or other legal considerations. If a practice wishes, given the current unprecedented circumstances, to provide salary continuation or other benefits that it typically does not, it should clearly communicate its plans to employee and seek legal guidance. Issues to consider in the practice's decision to lay off staff include eligibility for unemployment compensation, employee benefits and COBRA, risk of employment discrimination claims, and other related issues.
 - When an employee is no longer employed, that person should no longer provide services for the practice, even if on a "volunteer" basis. Allowing such an individual to continue to provide services raises a number of issues, including concerns related to wage and hour laws and potential professional liability insurance coverage issues.

- If a practice reduces or terminates the hours of an employee that individual would generally be eligible for unemployment, with the ultimate eligibility determination to be made by the applicable state agency. If the employer elects to reduce an employee's income without terminating employment, in many states that employee may still be eligible for partial unemployment based on the reduction in compensation.
- Often times the terms "termination", "lay-off", and "furlough" are used generally to describe a person no longer being employed. From a legal perspective those terms do not limit, increase or otherwise determine a separating employee's legal rights or the employer's potential liability. Anytime an employee is subject to an adverse job action, he or she may challenge that action under any discrimination or other employment rights law.
- For a practice that wishes to continue health insurance coverage for its employees either during a reduction in work hours or as part of an anticipated temporary lay-off, there are a number of issues to consider. Initially, the practice should consult with its health insurance carrier to determine whether a minimum number of work hours are required to be eligible for insurance coverage and, if so, should assure that these requirements are satisfied. Once any minimum work requirements are met, practices may wish to modify their policies to allow for a broader provision of health insurance coverage to difference classes of employees. The practice must consider how it elects to treat part-time employees that are recently subject to a reduction in work hours as compared to employees that have historically been part-time to mitigate the risk of discrimination claims and otherwise avoid a violation of the terms of the applicable insurance plan.

Paul Welk PT, JD is a Private Practice Section member and an attorney with Tucker Arensberg, P.C. where he frequently advises physical therapy private practices in the areas of corporate and healthcare law.

Albert S. Lee is an attorney with Tucker Arensberg, P.C. where he co-chairs the firm's Labor and Employment Practice Group.

Questions and comments can be directed to pwelk@tuckerlaw.com or alee@tuckerlaw.com

DISCLAIMER: Please note that this article is not intended to, and does not, serve as legal

advice to the reader but is for general information purposes only. Nothing in this article constitutes nor substitutes for specific legal advice that takes into account your organization's specific jurisdiction(s) or circumstances. Please seek legal counsel if you need specific guidance.